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# A Policy Assessment of The National Court of Appeals

By WILLIAM H. ALSUP\*

MAJOR legislation to relieve the United States Supreme Court of its "overwork" has not been enacted since the Judges Bill of 1925.<sup>1</sup> Nor has such legislation been considered since the defeat of the President's Court reorganization plan of 1937.<sup>2</sup> Nevertheless, it continues to be suggested that the Supreme Court has too many duties to discharge all of them responsibly. For example, in 1959 Professor Hart attempted to demonstrate that the justices had to evaluate so many applications for review that they had little time left to decide the merits of the argued cases.<sup>3</sup> Most prominent among the recent alarms is the *Report of the Study Group on the Caseload of the Supreme*

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1. Act of Feb. 13, 1925, ch. 229, 43 Stat. 936. The eight installments of F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT—A STUDY IN THE FEDERAL JUDICIAL SYSTEM* (1927), which traces the nature and intensity of the caseload of the Supreme Court from 1789 until the passage of the Judges Bill in 1925, and the last chapter of which contains a remarkably current gaze into the future to the present controversy are contained in serial form in 38 HARV. L. REV. 1005 (1925); 39 HARV. L. REV. 35 (1925); 39 HARV. L. REV. 325, 587, 1046 (1926), 40 HARV. L. REV. 421, 834, 1110 (1927). See also Frankfurter & Landis, *The Supreme Court Under the Judiciary Act of 1925*, 42 HARV. L. REV. 1 (1928).

2. S. 1392, 75th Cong., 1st Sess. (1937), summarized in S. REP. NO. 711, 75th Cong., 1st Sess. 1, at 3 (1937).

3. Hart, *The Supreme Court 1958 Term, Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 91 (1959). See also Griswold, *The Supreme Court 1959 Term, Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81 (1960). But see Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960).

*Court*.<sup>4</sup> So much has been said about this report that it may be worthwhile to examine the battlelines forming around it.

The essence of this proposal is that a National Court of Appeals be created to screen the swelling docket of applications for review by the Court. The sponsors of the plan are among the most distinguished of our law faculties and practitioners, belonging to a commission appointed by the Chief Justice of the United States in the fall of 1971 to study the problem of the Court's burgeoning docket. The chairman of the study group is Professor Paul A. Freund of the Harvard Law School.<sup>5</sup> He and his colleagues, themselves familiar with the work of the Court, interviewed each of the justices and a few of their law clerks and, after their own deliberations, issued their recommendations on December 19, 1972.

In addition to a less controversial recommendation that direct appeals to the Supreme Court be abolished, the panel suggested that Congress create a new tier of the federal appellate courts to be known as the National Court of Appeals and to consist of seven seasoned judges drawn on a rotating basis from the existing courts of appeals. The new court would have two functions. It would sort through all the petitions for certiorari (and jurisdictional statements if appeals were continued) and would refer only the most "review-worthy" to the Supreme Court for its consideration. The remaining applications would then be denied without recourse to the Supreme Court. Additionally, the new court would retain for its own unreviewable decision on the merits those cases in which the circuits were in conflict but the issues were not deemed to be "certworthy." In this way the justices—now said to be careworn with excessive duties—would gain more time to indulge in the collegial and deliberative processes of making and elaborating national law.

This article will consider the proposed creation of a National Court of Appeals and will focus in particular upon a critique of the

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4. FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972) [hereinafter cited as REPORT].

5. The other members of the panel are Alexander M. Bickel of the Yale Law School; Peter D. Ehrenhaft of Fried, Frank, Harris, Shriver and Kampelman, Washington, D.C.; Russell D. Niles of the School of Law of New York University and of Hastings College of the Law and Directors of the Institute of Judicial Administration; Bernard G. Segal of Schnader, Harrison, Segal and Lewis of Philadelphia and a past president of the American Bar Association; Robert Stern of Mayer, Brown & Platt of Chicago and co-author of R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE (4th ed. 1969) [hereinafter cited as STERN & GRESSMAN]; and Charles Alan Wright of the University of Texas School of Law and author of C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS (2d ed. 1970).

policy arguments advanced and omitted by both proponents and opponents of the plan. Neither the constitutionality of the new court nor the political motivations, if any, of its sponsors will be considered.<sup>6</sup>

### I. *The Present Screening Process and How It Would Be Changed*

The present method and practice by which the Supreme Court selects cases for review is a combination of statutory requirement and tradition. In recent years about 3700 applications for review have been filed annually by litigants complaining of adverse judgments rendered in lower federal or state courts. These applications are either by way of appeals which the Court is obliged to decide, or by way of requesting the issuance of a writ of certiorari which the Court may deny in its discretion. Fewer than 200 of these cases are decided on the merits, the rest being denied review without opinion. Nonetheless, the process of choosing the select few is a vital aspect of the justices' work.

The document filed with the Supreme Court in most instances is called a petition for writ of certiorari. In the relatively rare cases for which Congress has provided for an "appeal," the litigant requests the review to which he is entitled by filing a timely "jurisdictional statement." When a petition for a writ of certiorari or jurisdictional statement is docketed, the clerk of the Supreme Court gives it a case number and all copies are stamped and then placed for storage in a large room. Usually within the next thirty days the opposing party files

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6. For discussions of the constitutionality of the proposed court, compare Black, *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883, 885-887 (1974) (There can be only one Supreme Court under Article III) [hereinafter cited as Black]; Comment, *The National Court of Appeals: Composition, Constitutionality, and Desirability*, 41 FORDHAM L. REV. 863, 865 (1973) (constitutionality is "open to question") and Address by Earl Warren, Meeting of the Association of the Bar of the City of New York, May 1, 1973, reprinted in part in 59 A.B.A.J. 721, 729 (1973) (unconstitutional under "the one Supreme Court" clause) [hereinafter cited as Warren], with A. BICKEL, *THE CASELOAD OF THE SUPREME COURT* 35 (American Enterprise Institute for Public Policy Research 1973) (argument that proposed court would be unconstitutional is a play on words) [hereinafter cited as BICKEL]; Note, *The National Court of Appeals: A Qualified Concurrence*, 62 GEO. L.J. 881, 887-891 (1974) (No precedent exists to support challenge based on "one Supreme Court" clause). For the suggestion that the chief justice handpicked a group of law teachers and practitioners known to favor narrowing the Supreme Court's role and authority and that the national Court of Appeals is simply their vehicle to accomplish that end, see Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A.J. 253 (1973) [hereinafter cited as Gressman]; Warren, *supra*, at 725-26; Westen, *Threat to the Supreme Court*, NEW YORK REVIEW OF BOOKS, FEB. 22, 1973, at 29.

a response, arguing that the petition should not be granted or that the appeal should be dismissed.<sup>7</sup> When a response is filed it is coupled with its corresponding petition and both are identified as ripe for circulation to the various chambers. If a respondent or appellee delays too long, the clerk will designate the petition or jurisdictional statement alone as ready for consideration. Each week a bundle of about seventy such cases is distributed by the clerk's staff.

Once these bundles are received in the various chambers, the method for their screening differs from office to office.<sup>8</sup> The traditional pattern has been for a justice's law clerks to divide the weekly bundle in equal stacks for each clerk to read and summarize with a separate memorandum for each case. Then the week's worth of petitions are delivered to their justice along with the "cert memos." After studying their analyses and supplementing their digests by consulting the applications and responses as he believes is necessary, a justice sends to the chief justice an enumeration of those cases which he believes may warrant review by the full Court.

Some of the present justices do not follow the traditional pattern of asking their law clerks to digest petitions for certiorari and appeals. Justice Brennan, for example, prefers, as did Justice Frankfurter, to scrutinize the applications himself without memoranda from his clerks. In addition, five of the justices (the four most recent appointees and Justice Byron White) have assigned their law clerks to a pooled effort for summarizing petitions.<sup>9</sup> Instead of five separate summaries of each case being prepared, only one memorandum is written, to be shared by all five justices. Regardless of the way in which a justice is exposed to the applications, however, every justice sends to the chief justice a listing of cases which he thinks warrants review.

Any case which attracts the attention of even one member of the Court is placed by the chief justice on the "discuss list." In addition to certiorari cases of interest, all appeals are routinely included on the

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7. See RULES OF THE SUPREME COURT OF THE UNITED STATES 16, 24.

8. For a discussion of how various justices have processed applications for review, see Brennan, *Justice Brennan Calls National Court of Appeals Proposal "Fundamentally Unnecessary and Ill Advised"*, 59 A.B.A.J. 835 (1973) [hereinafter cited as Brennan]. For discussions of how the Court processes applications without reference to individual justices' practices, see Clark, *The Decisional Processes of the Supreme Court*, 50 CORNELL L. REV. 385, 389-90 (1965) [hereinafter cited as Clark]; Harlan, *Manning the Dikes*, 13 RECORD OF THE N.Y.C.B.A. 541-55 (1958); Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 AUSTRALIAN L.J. 108 (1959) [hereinafter cited as Harlan]; TIME, Dec. 11, 1972, at 72-73.

9. TIME, Dec. 11, 1972, at 72.

discuss list even though many of them typically arouse no interest. All cases on the discuss list are mentioned in conference whereas those not on it are denied automatically without further consideration. In recent years about 1100 applications have been discussed in conference annually.<sup>10</sup>

After the discuss list is transmitted to each of the chambers, the papers and memoranda in all cases contained in the discuss list are gathered together and the remaining items are "dead listed" and culled. The assembled material is taken by the justice into the conference room during the session in which petitions for certiorari and jurisdictional statements are discussed. Usually this is the Friday conference. Each justice speaks his mind on each application on the agenda and under the traditional Rule of Four a petition is "granted" and will be scheduled for oral argument when four justices believe it presents a substantial question of national importance. Occasionally a justice who is relatively indifferent on a particular case will join two or three who feel strongly that it should be taken. Precisely what moves the justices to seize upon certain cases and to reject others is something of a mystery and a matter for which one develops a "feel," as Justice Harlan put it.<sup>11</sup> Sometimes when further argument would be of little assistance in deciding the merits, a petition is granted and the Court disposes of the merits in the same conference, foregoing oral argument and acting without the benefit of full briefs, provided a majority so votes and fewer than four believe the issue warrants plenary consideration.<sup>12</sup>

The processing of appeals, which the Freund Committee would have screened by its National Court of Appeals, is part and parcel of this process. Some important differences remain, however, between the processing of appeals and petitions for certiorari. As noted above, all appeals are mentioned in conference, however briefly, whereas most petitions for certiorari are not. Moreover, by providing for appeals in certain situations, Congress has already decided that the issues raised thereby warrant review—pretermittting the Court's own judgment on the initial question of whether or not to take the case—and the only remaining question is whether plenary or summary re-

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10. Brennan, *supra* note 8, at 838.

11. Harlan, *Manning the Dikes*, 13 RECORD OF THE N.Y.C.B.A. 549 (1958).

12. Stern and Gressman observe that usually these are cases in which the lower court was obviously in error due to a clearly controlling precedent of the Supreme Court or should be allowed an opportunity to reconsider its holding in light of intervening decisions of the Supreme Court. STERN & GRESSMAN, *supra* note 5, at § 5.12.

view is more appropriate. It has been observed, however, that the two modes of review are gradually being merged for all practical purposes. For example, a great number of appeals are "dismissed" for lack of a substantial federal question on the theory that the congressional mandate does not require resolution of insubstantial matters.<sup>13</sup> It has been suggested that such dismissals are governed by the same discretionary factors which lead the Court to deny petitions for writ of certiorari, that is, once it is concluded that the issues presented are insubstantial, the application is "denied" if it is a petition for writ of certiorari and is "dismissed" or "affirmed" if it is an appeal.<sup>14</sup> Although there are precedential difference in these dispositions, it is plain that, as Justice Clark acknowledged, the procedures used in reaching them are the same.<sup>15</sup> It is important to remember that most of the discussed items are currently denied review, whether they are appeals or "certs," and that about two-thirds of the filings are denied without any discussion.

After the conference, the results are communicated by the chief justice to the clerk. In turn, he prepares an "order list," which states the cases in which review was finally denied or granted. The order list is made public at a subsequent session of the Court.

The establishment of a National Court of Appeals would not wholly eliminate this sifting process. Although applications for review would be filed with the Clerk of the National Court of Appeals rather

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13. This practice dates back to *Equitable Life Assurance Soc'y v. Brown*, 187 U.S. 308, 311 (1902), in which the Court reestablished an earlier line of cases holding that it would dismiss cases in which the question raised was wholly lacking in merit. *Accord*, *Zucht v. King*, 260 U.S. 174, 176 (1922); *Sugarmann v. United States*, 249 U.S. 182, 184 (1919). The earlier line of cases is discussed in Ulman & Spears, *Dismissed For Want of A Substantial Federal Question*, 20 B.U.L. REV. 501, 507-15 (1940). Supreme Court Rule 15(1)(e) requires that each jurisdictional statement provide reasons why the question presented is substantial enough to warrant oral argument.

14. *Linehan v. Waterfront Comm'n*, 347 U.S. 439 (1954) (Douglas, J., dissenting); STERN & GRESSMAN, *supra* note 5, at §§ 4.28-29; Frankfurter & Landis, *The Business of the Supreme Court at October Term, 1929*, 44 HARV. L. REV. 1, 12-14 (1930). There is a difference between a summary dismissal and an affirmance of an appeal. Although both actions are "on the merits," (*Equitable Life Assurance Soc'y v. Brown*, 187 U.S. 308, 315 (1902)), a dismissal results when the question presented is frivolous whereas an affirmance results when the question, although not frivolous, does not warrant oral argument. The distinction was first made in *Chicago, Rock Island & Pacific Ry. v. Devine*, 239 U.S. 52, 54 (1915).

15. Clark, *supra* note 8, at 389. For a discussion of the differences between the precedential effect of a denial of a petition for writ of certiorari and a summary dismissal or affirmance of an appeal, see Note, *Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent*, 52 B.U.L. REV. 373 (1972).

than with the Clerk of the Supreme Court (which for convenience might be the same office), and although the proposed court would have the first opportunity to evaluate these applications and the absolute power to deny any of them, the National Court of Appeals would not have the authority to grant a petition. Rather, it would annually certify or pass on to the Supreme Court four or five hundred cases which it believed to be worthy of the justices' attention. From this number the Supreme Court would select its usual 150 to 200 cases each term for plenary or summary consideration, using a selection procedure presumably similar to its present system, but involving only about ten to fifteen petitions each week rather than seventy. The important point is that the vast majority of certiorari petitions and jurisdictional statements would never reach the attention of the justices, for the Supreme Court would not have the power to overrule a denial by the judges of the National Court of Appeals.<sup>16</sup>

## II. *Public Reaction to the Proposal*

The release of the Freund Committee report has drawn a wide variety of reactions from both the bench and the bar. First among the sitting justices to voice reservations was William O. Douglas. In *Tidewater Oil Co. v. United States*,<sup>17</sup> he observed without referring explicitly to the proposal (which at the time had not yet been made public) that the idea that the Court is overworked is "myth."<sup>18</sup> He pointed to the fact that the number of cases decided on the merits had remained constant over the decades, and remarked upon the number of separate opinions filed each term, which he said were the discretionary products of the "vast leisure time" of the justices.<sup>19</sup> The really surfeited judges, he suggested, were the circuit judges (with whom the new court would be staffed).<sup>20</sup>

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16. REPORT, *supra* note 4, at 21. The Freund Committee proposes that the Supreme Court retain the power to grant certiorari before judgment in a Court of Appeals, before denial of review by the National Court of Appeals, or before judgment in a case set down for hearing there. *Id.*

17. 409 U.S. 151 (1972); *accord*, Douglas, *Managing the Docket of the Supreme Court of the United States*, 25 RECORD OF N.Y.C.B.A. 279, 297-98 (1970); *California Dep't of Motor Vehicles v. Rios*, 410 U.S. 425, 427 (1973) (Douglas, J., dissenting.) Justice Douglas states in the preface to the first 493-page volume of his autobiography that "[i]f the Court work were as demanding as some make out, I would not have had time for this and other writing projects. But it has never demanded more than four days a week", W. Douglas, *Go East, Young Man* xii (1974).

18. 409 U.S. 151, 174 (1972) (dissenting opinion).

19. *Id.* at 177.

20. *Id.* at 176.



Former Chief Justice Earl Warren, who has otherwise steered clear of controversies in his retirement, was more blunt.<sup>21</sup> Speaking before the Association of the Bar of the City of New York on May 1, 1973, he adamantly opposed the proposal, challenging not only the panel's reasons for it but the panel's procedure for interviewing the justices. On the latter score it was said that the very purpose of the study group was not made clear until the publication of its report and that the group never privately put their scheme to any of the justices prior to its promulgation; nor were the justices asked whether any structural changes in the federal judiciary system were desirable. Additional opposition has come from Justice William Brennan,<sup>22</sup> former Justice Arthur Goldberg,<sup>23</sup> numerous law professors<sup>24</sup> and Supreme Court practitioners,<sup>25</sup> and law review commentaries.<sup>26</sup> Most of the foregoing have emphasized that the statistical rise in applications does not create a proportionate rise in demand on the justice's time in reviewing applications. Most of the increase, they say, is due to the *in forma*

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21. Warren, *supra* note 6, at 724.

22. Brennan, *supra* note 8; *accord*, Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473 (1973).

23. Goldberg, *One Supreme Court*, NEW REPUBLIC, Feb. 10, 1973, at 14 [hereinafter cited as Goldberg]. See also Letter from Arthur J. Goldberg to Editors of *The New Republic*, NEW REPUBLIC, March 24, 1973, at 31-32.

24. E.g., Black, *supra* note 6; Blumstein, *The Supreme Court's Jurisdiction—Reform Proposals, Discretionary Review, and Writ Dismissals*, 26 VAND. L. REV. 895 (1973); Dershowitz, *No More Court of Last Resort?*, New York Times, Jan. 7, 1973, 34, at 6, col. 1 (city ed.); Letter from Professor Stanley Friedelbaum to the editors of The New York Times, Jan. 11, 1973, at 38, col. 3 (city ed.); Powe, "The Supreme Court, The Freund Committee and The Proposed New National Court of Appeals," Radio speech on KUT-FM, Austin, Texas, Spring, 1973; Ulmer, *Revising the Jurisdiction of The Supreme Court: Mere Administration Reform or Substantive Policy Change?*, 58 MINN. L. REV. 121 (1973); and Westen, *Threat to The Supreme Court*, NEW YORK REVIEW OF BOOKS, Feb. 22, 1973, at 29.

25. E.g., Gressman, *supra*, note 6; Gressman, *The Constitution v. The Freund Report*, 41 GEO. WASH. L. REV. 951 (1973); Miller & Gressman, *National Appeals Court? Yes and No*, New York Times, April 11, 1973, at 47, col. 3 (city ed.); Lewin, *Helping the Court with Its Work*, NEW REPUBLIC, March 3, 1973, at 15 [hereinafter cited as Lewin]; Poe, Schmidt, and Whalen, *A National Court of Appeals: A Dissenting View*, 67 NW. U. L. REV. 842 (1973). See also Gressman, *Much Ado About Certiorari*, 52 GEO. L.J. 742, 745-49 (1964).

26. E.g., Note, *The National Court of Appeals: A Qualified Concurrence*, 62 GEO. L. J. 881 (1974); Comment, *The National Court of Appeals: Composition, Constitutionality and Desirability*, 41 FORDHAM L. REV. 863 (1973); and Note, *The National Court of Appeals: A Constitutionally Inferior Court?*, 72 MICH. L. REV. 290 (1973). See generally, Stokes, *National Court of Appeals: An Alternative Proposal*, 60 A.B.A.J. 179 (1974); Stockmeyer, *Rx for the Certiorari Crisis: A More Professional Staff*, 59 A.B.A.J. 846, 849 (1973); and Woodlock, *Law and Justice Report/Exploding Caseload sets off debate over how Supreme Court handles its work*, 5 NAT'L J. 595 (1973).

*pauperis* docket which is chiefly composed of petitions identifiable instantly as frivolous. Justice Potter Stewart felt it enough to remark that "the very heavy caseload is neither intolerable nor impossible to handle."<sup>27</sup> Circuit Judge Henry Friendly doubts that the new court would have the confidence of lower federal court judges and Judge David Bazelon, Chief Judge of the District of Columbia Circuit, believes the new court would conceal the injustices of our criminal justice systems by routinely denying prisoners' applications.<sup>28</sup> Less drastic steps than a new court have been urged by the *Wall Street Journal*.<sup>29</sup> Potentates of the American Bar Association were reportedly unimpressed with the proposal and its House of Delegates eventually endorsed a less drastic plan calling for a "National Division" of the United States Court of Appeals, which has also received the approval of The Advisory Council for Appellate Justice.<sup>30</sup>

Most vocal in defending the proposal, both in the television medium and in the press, has been Professor Alexander Bickel of the Yale Law School, a member of the Committee.<sup>31</sup> Professor Paul

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27. Dershowitz, *No More Court of Last Resort?*, New York Times, Jan. 7, 1973, § 4, at 6, col. 1, 2 (city ed.); 55 HARV. L. REC., No. 8, at 1 (1972).

28. Dershowitz, *No More Court of Last Resort?*, New York Times, Jan. 7, 1973, § 4, at 6, col. 1 (city ed.).

29. Wall Street Journal, Jan. 2, 1973, at 20, col. 1 (editorial). For further statements in opposition, see letter from Professor Stanley Friedelbaum to the Editors of the New York Times, New York Times, Jan. 11, 1973, at 38, col. 3 (city ed.); New York Times, Feb. 4, 1973, § 4, at 14, col. 3 (city ed.) (letter to editor from Philip Weinberg). See also Blumstein, *The Supreme Court's Jurisdiction—Reform Proposals, Discretionary Review, and Writ Dismissals*, 26 VAND. L. REV. 895 (1973); Ulmer, *Revising the Jurisdiction of the Supreme Court: Mere Administration Reform or Substantive Policy Change?*, 58 MINN. L. REV. 121 (1973). For a discussion of the constitutionality and introduction to the policy aspects of the proposal, see Comment, *The National Court of Appeals: Composition, Constitutionality and Desirability*, 41 FORDHAM L. REV. 863 (1973), and Note, *The National Court of Appeals: A Constitutional Inferior Court?*, 72 MICH. L. REV. 290 (1973). For a further opposition on policy grounds, see Poe, Schmidt and Whalen, *A National Court of Appeals: A Dissenting View*, 67 NW. U.L. REV. 842 (1973).

30. For a survey of generally negative opinions of ABA members and officials taken shortly after the release of The Freund Report, see New York Times, Feb. 17, 1973, at 13, col. 2 (city ed.). For details of the proposal to establish a National Division of the Court of Appeals to hear claims of state prisoners and to resolve conflicts among the circuits, see REPORT OF THE SPECIAL COMMITTEE ON COORDINATION OF JUDICIAL IMPROVEMENTS (1973); *House Favors National Division for Federal Courts of Appeals*, 60 A.B.A.J. 453 (1974); Hufstедler, *Courtship and Other Legal Arts*, 60 A.B.A.J. 545, 548 (1974); and New York Times, Jan. 21, 1974, at 11, col. 1 (city ed.). The Freund Report briefly considered and rejected the related idea of a court of criminal appeals. REPORT, *supra* note 4, at 12.

31. See Bickel, *supra* note 6. For a reply to Arthur Goldberg's statement, *supra* note 23, see Bickel, *The Overworked Court*, NEW REPUBLIC, Feb. 17, 1973, at 17.

Freund has also authored several statements in his committee's defense.<sup>32</sup> Moreover, various justices have warmly received the report's diagnosis, if not its prescription. For example, although it is unclear whether Chief Justice Burger has actually endorsed the National Court of Appeals, his statements, such as his address to the American Law Institute in Washington on May 15, 1973, call for a lightening of the Court's burdens. In that address he rebutted various criticisms of the proposal, emphasizing that something must be done to stem the swelling tide of applications for review.<sup>33</sup> In a similar way, Justice William H. Rehnquist has surveyed the history of congressional reaction to those occasions when it was thought the Court was overworked, leaving "unanswered" whether or not the remedy prescribed by the Freund Committee was the most desirable one available. He insisted, however, that the Court is deluged at the present and that some remedy is necessary.<sup>34</sup> His colleague, Justice Lewis F. Powell, Jr., announced in a speech to the Fifth Circuit Judicial Conference on April 11, 1973, the same reserved judgment stating that the Court is now inundated and some plan of relief is sorely needed, although he refused to say whether the National Court of Appeals was the best one.<sup>35</sup> Justice Harry A. Blackmun has not issued a written position on the proposal but is believed to feel overwhelmed by his judicial responsibilities. Justices Byron White and Thurgood Marshall have carefully avoided making any public statements on the proposal.<sup>36</sup>

So far, the plan has not found its way into a legislative proposal and no committee in Congress is currently studying the matter.<sup>37</sup>

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32. See Freund, *Why We Need the National Court of Appeals*, 59 A.B.A.J. 747 (1973) [hereinafter cited as Freund]; New York Times, April 11, 1973, at 47, col. 2 (city ed.) (guest editorial by Professor Freund); Address by Paul Freund, American Bar Association meeting, in Washington, D.C., Aug. 7, 1973.

33. Burger, *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal*, 59 A.B.A.J. 721, 724 (1973); see Burger, *The State of the Federal Judiciary—1972*, 58 A.B.A.J. 1049, 1053 (1972); Burger, *The State of the Federal Judiciary—1971*, 57 A.B.A.J. 855, 859 (1971).

34. Rehnquist, *The Supreme Court: Past and Present*, 59 A.B.A.J. 361 (1973).

35. Address by the Hon. Lewis F. Powell, Fifth Circuit Judicial Conference, in El Paso, Texas, April 11, 1973, at 3-12. For a reference by the chief justice ascribing a similar view to Justice Powell, see Burger, *The State of the Federal Judiciary—1973*, 58 A.B.A.J. 1049, 1053 (1972).

36. Letter from the Hon. Byron White to Author, Sept. 7, 1973 ("I have made no public statements addressed directly to the Freund Committee Report.").

37. See Stokes, *National Court of Appeals: An Alternative Proposal*, 60 A.B.A.J. 179 (1974). There was also a debate featuring Professor Peter Ehrenhaft, Alan Der-showitz, Paul Carrington and Paul Bator on "The Advocates," televised discussion of the topic: "Should We Create a National Court of Appeals to Ease The Burden on the Supreme Court," WNET/N.Y., Feb. 9, 1973,

### III. *An Appraisal of the Arguments*

This robust ventilation of views has identified a considerable number of policy arguments both supporting and opposing a National Court of Appeals. These views seem to be directly connected to the validity of one or more of the following propositions which are the essence of the Freund Committee's reasoning: (A) The ever-increasing task of reviewing applications for review has begun to compromise the quality of the decision-making process used for resolving cases on their merits; and such compromising would not be necessary if a National Court of Appeals were established to relieve the justices of reviewing petitions for writ of certiorari and jurisdictional statements. (These two propositions are so intertwined that they are best considered together.) (B) The creation of a National Court of Appeals would not, on balance, generate more new problems than it would solve. (C) All other remedies either are stopgap measures which would still leave the Court overwhelmed or are otherwise undesirable.

#### A. Compromising of the Decisional Process

In "inferring" that there has been a compromise of the Court's adjudicatory process, the Freund Committee offered the major premise that the more tasks the justices must personally do, the greater the chance that they will do some of them poorly. The familiar statistics showing such things as the fact that there were approximately three times as many filings in the 1971 term as in the 1951 term were also set forth. The following passages from the report deserve full quotation:

Any assessment of the Court's workload will be affected by the conception that is held of the Court's function in our judicial system and in our national life. We accept and underscore the traditional view that the Supreme Court is not simply another court of errors and appeals. Its role is a distinctive and essential one in our legal and constitutional order: to define and vindicate the rights guaranteed by the Constitution, to assure the uniformity of federal law, and to maintain the constitutional distribution of powers in our federal union.

The cases which it is the primary duty of the Court to decide are those that, by hypothesis, present the most fundamental and difficult issues of law and judgment. To secure the uniform application of federal law the Court must resolve problems on which able judges in lower courts have differed among themselves. To maintain the constitutional order the Court must decide controversies that have sharply divided legislators, lawyers, and the public. And in deciding, the Court must strive to understand and

elucidate the complexities of the issues, to give direction to the law, and to be as precise, persuasive, and invulnerable as possible in its exposition. The task of decision must clearly be a process, not an event, a process at the opposite pole from the "processing" of cases in a high-speed, high-volume enterprise. The indispensable condition for the discharge of the Court's responsibility is adequate time and ease of mind for research, reflection, and consultation in reaching a judgment, for critical review by colleagues when a draft opinion is prepared, and for clarification and revision in light of all that has gone before.<sup>38</sup>

. . . .

The statistics of the Court's current workload, both in absolute terms and in the mounting trend, are impressive evidence that the conditions essential for the performance of the Court's mission do not exist. For an ordinary appellate court the burgeoning volume of cases would be a staggering burden; for the Supreme Court the pressure of the docket are incompatible with the appropriate fulfillment of its historic and essential functions.<sup>39</sup>

The reaction to passages such as these has been a preoccupation with whether or not the justices really have substantially more to do nowadays than a decade or two ago. This is understandable since the report itself seems to take it for granted that in those halcyon days the Court's resources were appropriately allocated between reviewing petitions and its other functions. The reader is left with the impression that the study group is worried only about the impact of the statistical increase on what was once an optimum equilibrium of duties. The reference in Professor Freund's article in this issue<sup>40</sup> to Justice Harlan's statement in 1959 that the breaking point had not been reached, but that it might eventually be, reinforces this impression. It has been natural enough therefore for critics to begin with the same unspoken assumption and to address only the true effect of the increased filings. This approach is less productive than others (for reasons suggested later), but surveying the observations it has fetched is nonetheless illuminating.

First, there is the remarkable fact that the Court is presently current in its docket.<sup>41</sup> In an era when in many courts it is routinely taken for granted that the delay in disposing of cases is measurable in years, it is comforting to learn that the Supreme Court usually acts upon a new filing within three or four months of its being docketed. This phenomenon takes on additional significance in light of the fact that Congress has never sought to relieve the Court until there was

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38. REPORT, *supra* note 4, at 1.

39. *Id.* at 5.

40. P. 1301-02 *supra*.

41. *Id.* at 2. Gressman, *supra* note 6, at 254; Warren, *supra* note 6, at 727.

clear and convincing evidence of a backlog. For example, prior to the creation of the circuit courts of appeals in 1891, the Supreme Court's backlog had created an interval of approximately four years between the docketing of cases and their disposition, and prior to the passage of the Judges Bill in 1925 there was a shorter delay.<sup>42</sup> In addition, there is the fact that the members of the Court manage a three month summer recess and a one month winter vacation, although they keep in constant communication with their offices during these breaks. And, there is more leisure time on weekends today than twenty years ago when arguments were heard on all weekdays with the conference on Saturday. Since 1955 weekends have rarely been used for conference and argument.<sup>43</sup> Justice Douglas, moreover, has reminded us that the number of decided cases each year has remained fairly constant over the decades, a fact which at least shows that the Court has not contracted the absolute number of issues considered on the merits despite the increase in applications for review.<sup>44</sup>

Furthermore, those justices who have served during the statistical climb believe that there has not been a degeneration of the Court's processes. Justice Stewart, on the Court since 1958, opines that the proposed court will not be needed within the next ten years even if the statistics grow at the present rate.<sup>45</sup> His colleague, Justice Brennan, states that he spent no more time reviewing the 3643 cases of the 1971 term than he did screening half as many in his first term in 1956. Experience, he posits, is unquestionably the "equalizer."<sup>46</sup> Former Chief Justice Earl Warren, who presided over a large part of the statistical increase, adds that there was no adverse effect on the quality of the adjudication process during his tenure.<sup>47</sup> Most critics of the proposal have been quick to observe that the great majority of all petitions are immediately identifiable as unlikely prospects for the writ and therefore only a small amount of time is really required

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42. For a discussion of the backlogs preceding the Evarts Act, Act of Mar. 3, 1891, ch. 517, 26 Stat. 826, and the Judges Bill, Act of Feb. 13, 1925, ch. 229, 43 Stat. 936, see P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 39-41 (2d ed. 1973); F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT, A STUDY OF THE FEDERAL JUDICIAL SYSTEM* 55-102, 255-99 (1927); Maris, *The Federal Judicial System*, 12 *MODERN FEDERAL PRACTICE DIGEST* 815-17 (1960); REPORT, *supra* note 4, at 8.

43. Douglas, *The Supreme Court and Its Case Load*, 45 *CORNELL L.Q.* 401, 405-06 (1960).

44. *Tidewater Oil Co. v. United States*, 409 U.S. 151, 174-75 (1972).

45. See note 27 *supra*.

46. Brennan, *supra* note 8, at 837.

47. Warren, *supra* note 6, at 726-27.

to evaluate them and that most of the statistical increase has been in paupers' applications, which have more than their share of frivolous claims.

On the other hand, three members of the Court—Justices Rehnquist and Powell and the chief justice—have flatly stated their belief that there does not exist sufficient time for the reflection, research and colloquy necessary for the proper elucidation of national law when applications for review must be assessed at a year-round clip of seventy per week.<sup>48</sup>

These three, however, are relatively new to the bench and its responsibilities, and it has been asked whether their complaint is a traditional one voiced by new Court appointees. It is perhaps relevant that when they were first appointed, both Justices Harlan and Stewart found occasions to comment on the heavy hours they were required to invest in their responsibilities.<sup>49</sup> Chief Justice Warren recounts new appointees have always felt overwhelmed by their new and tremendous responsibilities.<sup>50</sup> Justice Douglas suggests that ten years are required before a justice has adapted.<sup>51</sup> Of course, a decade is a long time to wait and it will be little comfort to the new justices that due to learning curve economies they will never have to spend more time on the certs than they do now.

Two different and reasonable conclusions may be drawn. Both are consistent with the foregoing evidence. The first is that the impact of the swelling certioraris has been overdone, that the newer justices would have been as overworked ten years ago and that their problems will eventually dissolve in experience. The second is that there has been a quantum jump in the responsibilities of the Court, that only experience has enabled the veterans of the Court to keep abreast of the heavier demands and that the job of freshman justices, always difficult, is becoming harder and harder.

The important point, however, is to recognize that there are substantial limitations on beginning with either set of conclusions. The problem with this entire approach is that neither of these findings lends itself to a ready assessment of the National Court of Appeals. For example, even if the Court is no more overworked or underworked than in days past, the new Court might still be an improve-

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48. See notes 34-36 & accompanying text *supra*.

49. Westen, *Threat to the Supreme Court*, NEW YORK REVIEW OF BOOKS, Feb. 22, 1973, at 30.

50. Warren, *supra* note 6, at 728-29.

51. *Id.*

ment. Even if there has been no depreciation of the adjudication process perhaps more time would have enhanced it. Conversely, even if there has been a genuine strain caused by the increased certioraris, the new Court might be a cure worse than the illness. The approach is useful only if it is assumed that in years past the talents of the Court were optimally employed and it is found that the rising filings have not required an adjustment.

It is therefore regrettable that the idea of "overwork" has crept into the debate at all. A more useful issue is whether or not the proposed system has more advantages than the present one. The principal improvement of the new court is said to be that the justices would not be required to devote time to evaluating the vast majority of applications which tend to be less "reviewworthy." This time could be diverted to the process of making law. There are disadvantages of the proposal which will be considered hereafter, but, for the moment, it is worthwhile to explore the scope of the supposed economies.

Initially, it is important to remember that the Freund Committee would still have the justices examine the cream of the annual crop of applications for review, the very petitions on which they are presently spending the vast majority of their screening time in chambers and in conference. All that would be saved, therefore, would be the time normally accorded to those petitions which with experience the justices are able to recognize instinctively as ineligible candidates for review. Although the report expressly refrained from predicting how much time this would be, the point has become highly controverted.<sup>52</sup> Former Justice Arthur Goldberg asserts that an "astonishing number" of applications can be "immediately" identified as unworthy of review—even by a "third-year student."<sup>53</sup> Former law clerk Nathan Lewin agrees, recalling that Justice Frankfurter scanned a week's worth of petitions himself at bedtime in a single evening.<sup>54</sup> Judge Henry Friendly believes that a "good half" of the petitions can be denied on the basis of a short memorandum prepared by a law clerk.<sup>55</sup> Justice Brennan finds that in a "substantial percentage of cases" he need go no further than the "questions presented," citing as an illustration the following issue actually raised in a recent petition: "Is the Sixteenth Amendment unconstitutional as violative of the Fourteenth Amendment?"<sup>56</sup> In 1937 Chief Justice Hughes remarked that

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52. REPORT, *supra* note 4, at 6, 23.

53. Goldberg, *supra* note 23, at 15.

54. Lewin, *supra* note 25, at 16.

55. H. FRIENDLY, *FEDERAL JURISDICTION* 50 (1973) [hereinafter cited as FRIENDLY].

56. Brennan, *supra* note 8, at 836-37.



[a]bout 60 percent of the applications for certiorari [were] wholly without merit and ought never to have been made. There are probably 20 percent or so in addition which have a fair degree of plausibility but which fail to survive critical examination.<sup>57</sup>

Professor Bickel is irritated by estimates such as these and complains that "[n]o case can be regarded as trivial in any absolute sense [since] somebody's fate does hang in the balance in each case . . . ." Moreover, because the cases which reach the Court have been self-selected, he concludes that they already are the cream of the crop and care ought to be taken in choosing among them. He then turns to the question of how much time is adequate "on the average." He concedes that half an hour per case is an overestimate and settles on fifteen minutes, "perhaps less."<sup>58</sup>

Professor Bickel's response misses the point. First, even assuming that his average estimate of perhaps-less-than-fifteen-minutes is reasonably accurate, the fact remains that the "average" time for *all* petitions is wholly immaterial. What is relevant is the average time consumed by the petitions which would be culled by the National Court of Appeals. These will be less substantial by definition and will require far less time on the average than those certified by the new Court of Appeals. Second, the fact that someone's fate hangs in the balance of each case is not relevant, for the Supreme Court is not a last court of errors and appeals. Even a petition involving the fate of impoverished widows and orphans must be rejected out of hand if it raises no issues beyond state law questions. Whether or not a third-year law student would be able to spot many such cases, a justice of the Supreme Court learns to do so quickly. Justice Harlan recognized that a great many petitions fell into this category. He blamed the bar for not appreciating the nature of the questions decided by the Court and for yielding to the "understandable impulse of . . . solvent client[s] to carry a hard-fought cause to the highest tribunal, forlorn as the hope of success may be."<sup>59</sup> That an attorney labors long on a petition of great human drama but of frail substance does not give him an assist in the Supreme Court. Nor should it.

On first blush, one minute per petition per justice may seem an outrageously short average time for denying the worst 3200 of 3700 applications. Of course, no petition is granted after only a minute's

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57. S. Rep. No. 711, 75th Cong., 1st Sess 40 (1937).

58. Bickel, *supra* note 6, at 21-22. See also Bickel, *The Overworked Court*, NEW REPUBLIC, Feb. 17, 1973, at 17.

59. Harlan, *supra* note 8, at 114.

consideration. Yet a great many can be denied in even shorter time. It must be remembered that the Rules of the Supreme Court are aimed in part at requiring petitions and responses to be arranged so as to facilitate swift and accurate assessment. Rule 23(c), for example, requires each petition to have a section entitled "Questions Presented." When the question presented is absurd as framed by the petition itself a justice usually does not read further. Many applicants simply do not appreciate the caliber of problems the Supreme Court seeks. Even a case presenting a worthwhile problem is apt to be denied if it contains unilluminating questions presented, the assumption being that the inartful drafting reflects the quality of argument counsel would render. (When a petition is prepared by the litigant himself without the assistance of counsel the justices or their clerks have been known to read a little further. The Court is able to appoint counsel of its own choice if review is granted.) Another automatic ground for denial is a jurisdictional defect such as mootness or untimeliness. Since these usually occupy a prominent place in respondents' briefs, these are generally scanned first. Often this simple precaution pretermits all else counsel has to say. Only after hurdles such as these are passed must the importance of the issues presented be weighed, a sifting process for which justices acquire a "feel." A single reading is often enough to convince a justice, who is usually familiar with the cases cited, that although not frivolous a petition should be denied. Cases which survive this sifting process are those which make or come close to making the discuss list. These will take much more than a minute to assess. "Denys," however, are often casualties of the first few glances.

If one minute is about the average time required to deny the worst 3200 of 3700 petitions, then the National Court of Appeals would save a full week's working time over the course of a term.<sup>60</sup> If the average is higher the yearly saving will be proportionately higher. To be sure, this is an imposing block of judicial resources, but until the statistics grow substantially larger, this is about all that would be saved.<sup>61</sup> The Chief Justice recently reported that the case-

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60. On the assumption that the new court would cull 3200 cases, of which 2400 would each occupy each justice for one minute and 800 would each occupy each justice for three minutes, the total savings would be eighty hours per justice per term. Eighty hours is probably slightly more time than the justices average on official business in a typical week. *But see* Gressman, *supra* note 6, at 258 (proposal would only save "a few hours per week").

61. The Freund Committee proposes that the Supreme Court retain the power to grant certiorari before judgment in a Court of Appeals or before denial of review in

load of the lower federal courts did not increase in 1973 for the first time in recent history.<sup>62</sup> Perhaps we may hope that the caseload of the Supreme Court will eventually stabilize.

In addition, it is worth pausing to consider what alternative use the justices would make of this time. It is hoped by the Committee that it would be applied to the process of collegial consultation used in elaborating our national law. While it is difficult to resist this hope, and although the extra time would probably be absorbed for the most part by the rigors of deciding cases on the merits, it remains unclear to what extent an additional week would result in a healthier dialogue, flushing out more of the nuances, the analytical difficulties, and the relationships of the immediate issues to analogous problems. The traditional extent of the justices' dialogue is the time devoted to each argued case in conference and the written drafts and redrafts of opinions circulated afterwards.<sup>63</sup> Occasionally, a vote will change due to a persuasive opinion but that is rare. It is no secret that the votes and theories announced at the outset in conference usually remain unaltered. For example, Nathan Lewin, who clerked for Justice Harlan in 1961-1962, recalls that he saw "precious little" collegial consultation in an era when the work load of the Court was somewhat less. He has challenged Professors Freund and Bickel, who clerked for Justices Brandeis and Frankfurter respectively, to represent that they observed a vibrant interchange of opinion among the justices.<sup>64</sup>

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the National Court of Appeals. REPORT, *supra* note 4, at 21. This of course might run the risk that litigants will request prejudgment certiorari as a routine step in order to avoid the finality of the order denying review by the National Court of Appeals. Were this to become a regular practice then there would be less savings in time. Moreover, at some point the National Court of Appeals may overlook a case which, if it were presented to the Supreme Court in the first instance, would be acted upon. When this happens, it would not take a particularly ingenious lawyer and certainly would not require much more than the ordinary zeal found among prison writ writers to seek a writ of mandamus from the Supreme Court to the National Court of Appeals. It would merely be a matter of time before the Supreme Court finally granted a writ of mandamus under the All-Writs Statute, 28 U.S.C. § 1651 (1970). Once this has happened the Supreme Court would be back where it is now, reviewing the actions of the National Court of Appeals by way of writs of mandamus and doing essentially the same job now done by writs of certiorari.

62. News release from Chambers of Chief Justice Burger, Jan. 1974, *The Federal Courts—The Year in Review*, at 1.

63. Clark, *supra* note 8, at 390-91; Harlan, *supra* note 8, at 115-16; Hart, *The Supreme Court 1958 Term, Forward: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 90-93 (1959).

64. Lewin, *supra* note 25 at 16. Neither Professor Bickel nor Professor Freund has yet asserted that more time would actually result in more collegial consultation, although both assert that such consultation is desirable and can never come to pass unless time permits. *E.g.*, Bickel, *supra* note 6, at 27-28.

The problem, if there is one, is less a lack of time than the fact that the susceptibility of the Court to a "deliberate, reasoned, collegial declaration and elaboration of national law" is solely determined by the personalities appointed to the Court. Most have been men of fierce independence, strong notions, and their basic predilections and sensitivities are no longer amenable to change.

Yet the fact remains that on some occasions a justice will be genuinely unsettled on the proper resolution of a case and more time to reflect on the matter would be helpful. Justice Harlan, for example, confessed in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*<sup>65</sup> to having reversed his initial position on whether or not there should be a civil remedy for a violation of Fourth Amendment rights. Another example appears to have been the soul-searching in the recent obscenity cases in which all agreed that some clear rule should be fashioned to extract the federal courts from the quagmire of obscenity law.<sup>66</sup> As rumor has it, the end result was by no means marked from the outset and a genuine and fresh reexamination of available alternatives was undertaken by many of the justices. Surely, the same trepidation has preceded many of the blockbuster pronouncements of the Court. Nathan Lewin himself recalls the story of Justice Harlan "rescuing" *Robinson v. California*<sup>67</sup> and convincing his colleagues to take the case in order to hold that a state may not punish one for merely being a narcotics addict.<sup>68</sup> Perhaps another example is the "Flag Salute Cases." After holding that laws requiring salutes by public schoolchildren were constitutional, the Court overruled the precedents in *Board of Education v. Barnette*.<sup>69</sup> Justices Black and Douglas voted with both majorities and voted to overrule after "[l]ong reflection."<sup>70</sup> Such occurrences suggest that some room for persuasion and consultation exists.

The point simply is that although the occasions for collegial consultation may be rare they are important and should be encouraged. This is especially true in a time of frequent 5-4 decisions when the

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65. 403 U.S. 388, 398 (1971) (concurring opinion). For the observation by Justice Harlan that "[i]t is by no means unknown for the alignment of the Justices, or indeed the result of a case, to change after opinions have been written," see Harlan, *supra* note 8, at 116.

66. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Miller v. California*, 413 U.S. 15 (1973).

67. 370 U.S. 660 (1962).

68. Lewin, *supra* note 25, at 18.

69. 319 U.S. 624 (1943), *overruling* *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

70. 319 U.S. at 643.

indecision of a single justice may provide more than the normal incentive to put forward the most convincing arguments.

In any event, it would be desirable to have more time to devote to opinion writing and to understanding the more complicated factual cases such as those involving regulatory systems. Despite the fact that on the whole the work of the Supreme Court is well done, unfortunate and unintended dicta can occasionally spawn regrettable results in the lower courts or lead to uncertainty in the planning of the public and private sectors. To some extent this evil is already controlled by the canon of precedent which pays less heed to unnecessary comments of judges than the actual holdings of cases. But still it is an annoyance. Beyond the problem of articulation there is the responsibility of understanding the record in each case and how any regulatory system at issue is implicated.

Notwithstanding the fact that the extra week could be applied to improving opinions, however, a genuine possibility exists that a substantial amount of the additional time might be spent in writing even more opinions which otherwise would not have been attempted. This appears to be the trend. Precisely how the members of the Court would invest an additional week is strictly a matter of conjecture.

This all suggests that while there are those who doubt that the Court is presently any more overworked than in past years, the real issue is whether or not the new court would be an improvement. To be sure, the plan would free approximately one week of time for each of the members of the Court as filings now stand, and most of this time would probably be divided between reflecting over issues and writing better or more opinions. (There would also be a savings in the time of law clerks, although this is less important inasmuch as ways less drastic than a new court are available to provide such relief.) Standing alone, these benefits would surely be an improvement, but it is doubtful that there would be a dramatic change in the final products of the Court.

#### B. Weighing Disadvantages

Whatever the scope of its benefit, the Freund Committee's plan has been oppugned as being fraught with evils which, it is said, were apparently not taken fully into account by the study group.

##### *The missed opportunity*

Most prominent is the criticism that the National Court of Appeals is apt to deny cases which the Supreme Court would, if given

the opportunity, take for either plenary or summary review. There is hard evidence to support this objection, for, as Justice Brennan has written, about 1100 cases make the "discuss list" and are examined in conference.<sup>71</sup> Since the Freund Committee would confine the discuss list to a maximum of 400-500 cases yearly, approximately 600-700 petitions each term, which would now be reviewed in conference, would be denied.

Although this statistic is an impressive one, it should be remembered that many items are discussed in conference even though none of the members of the Court thinks them worthy of review. All appeals, for example, are automatically discussed even though many of them are unanimously dismissed for lack of a substantial federal question. To the extent that the 600-700 cases barred from the Court would have fallen in this category it is safe to conclude that the Court would miss no opportunities it would regret. Moreover, the 600-700 cases would also include a fair number of "holds," cases which are now mentioned in conference not as candidates for review themselves but as cases that present issues which might be controlled by other cases awaiting final decision. Once the principal case is decided, if the lower court might have reached a different result under the principal case, the "hold" is granted review and immediately remanded for further consideration. As is detailed hereafter, although it might be awkward for the proposed court to withhold action on applications pending the disposition by the Supreme Court of argued cases with common issues, such a procedure could probably be administered. Thus many of the 600-700 missed opportunities would simply be cases which could be "held" by the new court.

Even making allowances for holds and appeals, however, there would be several hundred instances each term in which a petition was denied by the new court even though at least one justice would find in it a substantial federal question warranting, in his opinion, review by the full Court. Of these, there would probably be 20 or so cases which eventually would attract the votes of at least four justices.

This prospect has caused critics to question whether or not under the proposed screening procedure the Court would have had the opportunity to decide cases such as *Gideon v. Wainwright*,<sup>72</sup> which extended the right of assistance of counsel at trial to indigents accused in state courts of felonies, *Robinson v. California*,<sup>73</sup> which held that pun-

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71. Brennan, *supra* note 8, at 838.

72. 372 U.S. 335 (1963).

73. 370 U.S. 660 (1962).

ishment merely for being a narcotics addict was cruel and unusual, or *Brown v. Board of Education*,<sup>74</sup> or *Furman v. Georgia*.<sup>75</sup> Nathan Lewin's story about Justice Harlan rescuing *Robinson v. California* poses the spectre that the seven judges of the National Court of Appeals would, as eight of the justices themselves are prone to do, overlook the significance of a petition.<sup>76</sup>

Professors Freund and Bickel have replied that it is not remotely possible that a National Court of Appeals could have passed over such issues although they concede that those very cases might have been denied.<sup>77</sup> The signals that the Court was ready to consider the questions were there for the bench and the bar to see. Even the slightest possibility that four justices would grant a petition—even to overrule recent precedent—should be enough to warrant certification. This reply is somewhat reassuring but, unfortunately, leaves some points unanswered. In the term in which *Gideon* was decided, for example, dozens of petitions presenting the right-to-counsel issue were presented. The Court, having already decided to overrule *Betts v. Brady*,<sup>78</sup> set out to find the best vehicle for doing so. Petition after petition raising the issue was rejected as inappropriate for collateral reasons (unsympathetic defendant, other grounds could pretermite the question) until finally *Gideon*'s case was found.<sup>79</sup> In such circumstances not all of the dozens of cases would be certified by the National Court of Appeals (since certification of so many would substantially cut into the 400-500 limit). The result would be a restriction of the Court's menu of vehicles for reviewing the issue, all of which the Court might think inappropriate for collateral reasons.

Assuming, however, that the new court were so perceptive that no "major" issue which the Supreme Court were ready to hear went uncertified, the fact remains that each term several hundred petitions would be denied even though all of them would have been discussed and some of them granted. Although many of these would be the seemingly less significant cases, there is no doubt that due to the ceiling of 400-500 cases, the new court could not be responsive to all of the subtleties, nuances and interests of the Court even if they were

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74. 347 U.S. 483 (1954).

75. 408 U.S. 238 (1972).

76. *E.g.*, Black, *supra* note 6, at 888-91; Lewin, *supra* note 25, at 18. See also Brennan, *supra* note 8, at 839; Goldberg, *supra* note 23, at 15-16; Gressman, *supra* note 6, at 256; Warren, *supra* note 6, at 728.

77. Bickel, *supra* note 6, at 32-33; Freund, *supra* note 32, 251.

78. 316 U.S. 455 (1942).

79. Lewin, *supra* note 25, at 18.

well-known. The committee report and Professor Bickel concede this. The casualties would include cases such as *Cohen v. California*,<sup>80</sup> a case reversing the conviction of one who wore a jacket bearing the words "Fuck the Draft" into a courthouse, and a case which Justice Harlan described as being one which at first blush seemed too inconsequential to find its way into the books of the Supreme Court but which presented an issue of "no small constitutional significance."<sup>81</sup>

A related problem is the loss of many dissents from denials of the writ or from dismissals of appeals. In the past, these dissents have often signaled the interests of Court and encouraged the bar to continue to raise issues which ultimately have been taken by the Court. Such was true, for example, in the capital cases. In *Rudolph v. Alabama*,<sup>82</sup> Justice Goldberg dissented from the denial of the writ, suggesting that the death penalty might violate the Eighth and Fourteenth Amendments. Lawyers continued to raise the question, and finally in *Furman v. Georgia*<sup>83</sup> the Court decided the point. Justice Brennan worries that under the plan he would not be able to suggest through a dissent from the denial of certiorari that a substantial question exists as to the President's authority to prosecute a war in Indochina.<sup>84</sup>

Aside from presenting concrete cases on which to comment, the constant flow of petitions has the benefit of causing the justices to focus on issues which might not otherwise form in their minds. If a worthwhile issue crosses the screen it can be flagged in passing by a dissent from the denial of certiorari. Without this convenient procedure, there would be no such automatic indicator of the frontiers of the justices' thoughts and no efficient means of educating the justices about the nature of the issues being raised in the lower courts.

There would also be the loss of opportunities for a justice to place his imprimatur on the claim of a prisoner who may have been wronged in a way which does not warrant the Court's time but who, because of a short dissenting statement from the justice, will be able to get a second look when his conviction is brought before the lower courts on collateral attack. Because the vehicle for the collateral attack is likely to be a handwritten and inartful complaint prepared by the prisoner himself, masking the merit of the claim, the allusion to the fact that a

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80. 403 U.S. 15 (1971).

81. *Id.* at 15.

82. 375 U.S. 889 (1963).

83. 408 U.S. 238 (1972).

84. Brennan, *supra* note 8, at 838.



member of the Supreme Court thought the matter worth inquiry may alert the habeas court that the prisoner's petition is not frivolous.

To all of this it might be answered that each term the National Court of Appeals could simply certify more than 400-500 cases to the Supreme Court and thereby reduce the number of instances in which these various opportunities would be lost. This would probably work but at the cost of reducing substantially the savings in time originally contemplated. With respect to these extra few hundred cases, it should be remembered that although they would require less time than the 400-500 thought to be most review-worthy, they would still require more time to assess than the frivolous cases. At some point all that would be barred from the Court would be the clearly insubstantial applications which literally occupy only a few seconds per case of each justices' time, and thus the proposal would lose all of its appeal.

### *Holds*

A separate problem concerns "holds." As mentioned previously, a "hold" is a petition which is not acted upon until another pending decision is announced because both involve a common issue. For example, when the death penalty cases were handed down, several hundred other cases involving capital sentences had been accumulating in the files of the Court. None of these cases had been denied review even though only four were selected for testing the constitutionality of the death penalty. Until *Furman v. Georgia*,<sup>85</sup> these petitions were simply neither granted nor denied. Shortly after the death cases were announced, however, the conference reviewed all of the "holds for *Furman*" to determine if any other worthwhile issue was presented and if so, whether or not it was eclipsed by *Furman*. In the end, virtually all the judgments challenged by the holds were vacated and the cases were remanded for reconsideration in light of *Furman*. (Had the death penalty been sustained most of these petitions would have been simply denied.) The "hold" procedure is a salutary attempt to dispose of cases without breaking new ground and to supply a degree of uniformity which would be lacking if only a select few or a single case were taken to announce a new principle.

Critics of the Freund Committee have asked what its proposal would do to this meritorious aspect of Supreme Court procedure. So far the question has gone unanswered but one response would seem to be that, as mentioned before, a National Court of Appeals could

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85. 408 U.S. 238 (1972).

administer a similar "hold" procedure of its own. If it appeared that a petition or appeal presented an argument already being tested either in a case awaiting decision by the Supreme Court or already presented in a petition previously forwarded to the Supreme Court, then the National Court of Appeals could postpone action until the Supreme Court acted. When the Supreme Court disposed of the principal issue or petition, then presumably the National Court of Appeals would review any held case for that decision and if the lower court had correctly decided the issue, deny the petition, and if not, remand the case for reconsideration in light of the new decision.

If Congress did not authorize the National Court of Appeals to grant, vacate and remand in light of new Supreme Court opinions, certification would be in order to permit the Supreme Court to remand. Such certification would consume more of the justices' time. This might be preferable, however, to granting the National Court of Appeals the power to reverse or vacate in light of the Supreme Court's current pronouncements, a power which would open the door to the seven judges' own predilections about how close in point a recent Supreme Court opinion actually was and which would extend the role of the National Court of Appeals beyond mere screening.

Moreover, there would inevitably be imprecision in any hold apparatus not under the control of the Supreme Court. For example, there would be the problem of delay when the new court held a petition which under the present system the Supreme Court would deny immediately. This is illustrated by the fact that early in 1973 the Court refused to review the Memphis school desegregation case,<sup>86</sup> although at least one of the legal questions presented was seemingly similar to a question raised in the Denver school case then under submission.<sup>87</sup> Apparently, the Court believed the link between the two was too tenuous to warrant delaying the finality of the Memphis case. On the other hand, there might be error in the opposite direction. The new court might deny an application which the Supreme Court would now hold. The point is that a hold procedure inaugurated by the National Court of Appeals, while possible, could not be as precisely operated as the present hold procedure.

#### *Drawbacks of the new court*

Other objections concern the new court itself. It is said, for example, that it would be demeaning for judges accustomed to judging

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86. *Board of Educ. v. Northcross*, 410 U.S. 926 (1973).

87. *Keyes v. School Dist.*, 413 U.S. 189 (1973).

to be nothing more than "Glorified Law Clerks," in former Chief Justice Warren's phrase.<sup>88</sup> Various circuit judges have received the proposal unenthusiastically. It is said that the additional responsibility for resolving circuit conflicts would be a mere salve for the injured pride of members of the new court.<sup>89</sup> Perhaps this also explains the plan to rotate membership of the new court, although such changes in court personnel would surely sacrifice whatever proficiencies were attained in processing applications. To this Professor Bickel responds that we can assume that judges asked to serve would do so with the grace and dedication that is common to federal judges.<sup>90</sup> Undoubtedly we can. One important consequence of the plan, however, would be to shift the initial responsibility for reviewing applications from the law clerks of the justices to the law clerks of the members of the National Court of Appeals. At present at least the justices' assistants have the benefit of the justices' tutelage which lessens the risk that issues of interest are passed over. Moreover, there would be no collegial consultation among the members of the new court, at least face-to-face, inasmuch as they would be permitted to remain in their local chambers. Communications would be by mail or telephone.

#### *Weakening the Authority of the Court*

Finally there is the objection that it would no longer be true that the grievance of any man, however low his station in life, could receive the attention of the justices of the Supreme Court. Former Justice Arthur Goldberg has presented this argument quite forcefully, asserting that

[t]here is the greatest value in citizens being able to believe that, as a matter of principle, every man and woman has a right to take a claim involving basic rights and liberties to the Supreme Court of the United States. It is this belief that in part inspires the great popular reverence for the Supreme Court in its role as a "palladium of liberty," and a "citadel of justice."<sup>91</sup>

To the idea that it is the birthright of Americans to have access to the Supreme Court, Professor Bickel recalls Ernest Hemingway's conclusion of *The Sun Also Rises*: "Isn't it pretty to think so." Without revealing how much value he places in the palladium concept, Professor Bickel offers the thought that at some point the right of access will become meaningless unless a new procedure for evaluating appli-

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88. Warren, *supra* note 6, at 729.

89. *Id.*

90. Bickel, *supra* note 6, at 36-37.

91. Goldberg, *supra* note 23, at 16.

cations is developed. Using more clerks is undesirable, he says, because they are "invisible staff" whose use will ultimately foster disillusionment and cynicism because the public will know that the justices themselves will have time to give the applications only the most cursory and superficial consideration. Instead of preserving a symbol the bottom line will be a loss of confidence by all.<sup>92</sup> Moreover, in spite of the fact that the Supreme Court regularly waives fees and appoints counsel for indigents proceeding before it, Professor Bickel chides those paupers who daydream about being a contestant before the Supreme Court, citing the high costs of litigation.<sup>93</sup>

It is worth pausing over these conflicting views to identify some of their unspoken content and qualifications. One theme of former Justice Goldberg is preserving one legacy of the Warren Court: the faith of those with little influence in the other branches of government that the Supreme Court is willing to hear their grievances. Their belief need not depend, as Professor Bickel suggests it does, upon a fantasy of actually being a litigant before the Supreme Court, for an oppressed individual need only believe that if someone else similarly situated presents their common grievance to the Court that grievance will receive the same consideration given those of the more affluent and powerful. In the desegregation, reapportionment and criminal procedure areas, for example, millions were benefited who were not litigants. These persons and most liberals are the aficionados of the idea that the Supreme Court should be a guardian of liberties.

This idea is jeopardized in two ways by the proposed court. First, the establishment of a National Court of Appeals might lead to

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92. Bickel, *supra* note 6, at 34-35. There is one qualification to Professor Bickel's rejoinder that the right of access to the Supreme Court will become meaningless unless there is some institutional reform. To the extent that his remark depends upon the eventuality of the justices becoming unmercifully overburdened it will stand or fall on the analysis presented earlier. To the extent that it depends upon a groundswell of objections to law clerks' summarizing petitions and recommending dispositions, it assumes that the public and the legal community will more readily tolerate denials of certiorari by circuit judges acting on recommendations of their clerks than denials by the justices acting on recommendations of their own clerks and in consultation with each other in conference. This assumption is fairly open to question since law clerks, in their day-to-day association with their mentors, learn to appreciate the justices predilections and interests. They are generally in a position to summarize the very points of a case which will be of interest to a justice. Certainly the memoranda prepared in the present era are comprehensive enough to alert a justice to the need to examine the petition in more detail. On the rare occasion when a subtlety is completely missed it quite likely will be caught in other chambers and the case will be listed for discussion. All in all, very little of real importance is overlooked. The material which is unseen by the justices would rarely change the outcome of any case.

93. Bickel, *The Overworked Court*, NEW REPUBLIC, Feb. 17, 1973, at 17.

suspicion that these types of social protests were being systematically suppressed, although suspicions are not inevitable. If the new court were staffed by judges such as David Bazelon, Shirley Hufstедler, John Wisdom and Skelly Wright, few would suspect that the door had been closed to the oppressed. Even when these judges were in the minority, their refusal to dissent from a denial of a petition would be evidence that it would not have been found review-worthy even by a more sympathetic court. Moreover, the utility of access to the Supreme Court is a function of how much relief can be garnered from the lower courts and how receptive the justices themselves would be. Nowadays the former may be more sensitive to the problems of the powerless.

The second threat is the loss of opportunities for the Court to act summarily to correct manifest injustices in cases otherwise of no interest. These opportunities are reflected in the many short *per curiam* "grants and reversals." These are petitions which are granted and decided only on the basis of the certiorari petitions and without oral arguments or full briefs. Often they involve civil liberties claims which were mistakenly denied by the lower court. The National Court of Appeals would surely cull such cases because rarely are unsettled and important issues presented in them. In turn, the image of the Court as a dispenser of individual justice would be crippled.

It is easy enough to recognize that the cause of civil liberties would suffer but it is at least equally important to see the more fundamental point that the authority and legitimacy of the Court would be threatened. Unlike its sister institutions, the Supreme Court does not have periodic popular mandates from the polls to sustain its acceptability. Rather, its authority comes from other sources. One is undoubtedly the hope that its decisions are the inevitable dictates of neutral principles of law. It has also been suggested that the Court's acceptability derives from its image of being a guardian of liberties and a doer of justice.<sup>94</sup> If this is so then a crumbling of the citadel of justice would in turn cause an erosion of the Supreme Court's authority. This would please some Court scholars because it might force the Court to adhere more frequently to the elusive neutral principles in order to shore up its respectability. It would delight still others who believe that the Supreme Court should have much less influence anyway, usually on the theory that in a democratic system the role of nondemocratic institutions should be minimized.

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94. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968).

The degree of the Court's influence is implicated in still another way. The pace of judicial activism could be no faster than either the National Court of Appeals or the Supreme Court desired. For those who prefer that the judiciary not meddle so frequently in social and political affairs, the National Court of Appeals will supply a welcomed institutional check. It could deny important petitions on "collateral" grounds until it is "safe" to certify them. Or, it might hold and remand such petitions if they involve other issues seemingly analogous to other questions recently decided by the Supreme Court. To avoid the appearance of being too selective the new court might occasionally certify blockbuster issues but only in cases in which surrounding circumstances make them inappropriate vehicles for breaking new ground, indulging disingenuously in the aphorism that hard cases make bad law. Even if the sympathies of the two courts were identical, there would doubtlessly be unintended interference with the Supreme Court's orchestrating the chronological order in which it chooses to take and decide issues. Even though the right issues might be certified by a hopeful National Court of Appeals, the cases presenting them might be less appropriate environments for deciding them than other cases which were not certified. For those who believe it is essential that the Supreme Court remain free to choose the precise moments when it will dictate improvements in the political or criminal processes the National Court of Appeals will simply be a grave institutional flaw.

There would be recurring occasions for problems such as these to become visible. For example, the new court might certify a case presenting issue X and the Supreme Court might deny it. The next time a case involving that issue arose the judges would be caught in a dilemma. If the issue were again forwarded to the Supreme Court, suspicion among the justices and the public might arise that certain questions were being favored to the exclusion of others. If, on the other hand, the case were denied, the Supreme Court might be deprived of a vehicle for exploring an issue it passed over the first time only for collateral reasons.

The Goldberg-Bickel exchange implicates the traditional cosmic issues concerning the Supreme Court. Once it is appreciated that the palladium of liberty image is endangered one must ask whether public acceptability of the Court's decisions will also be weakened and, if so, whether that is desirable or undesirable. Apart from perceptions about the Supreme Court, there will be practical problems such as interference, perhaps unintended, with the Court's arrangement of the chronological order in which it prefers to decide various issues. Should

the politics of the two courts diverge, such interference might intensify and even become contrived through subtle devices. This would result in an internal check on the third branch of government. Reasonable minds may differ on the question of whether or not such restraints on the judiciary are desirable and on the question of whether or not the Supreme Court's acceptability should derive from its image as a doer of justice. These are philosophical questions which will require deep constitutional thought by congressmen when they turn to the Freund proposal.

### C. Alternatives

The study group arrived at its recommendation by the process of elimination, finally concluding that of all the alternatives (including the present system) its own was the least of evils. It was said, for example, that limiting the Supreme Court to constitutional issues would prevent it from deciding statutory issues which often are questions of national prominence. Moreover, this limitation would render awkward the process of construing statutes whose constitutionality is challenged.<sup>95</sup> A series of administrative courts of last resort would sacrifice the advantages of the big picture and would permit inconsistencies in the administration of justice by various independent tribunals.<sup>96</sup>

Other possible alternatives were rejected but one of them—more staff—has caught the eye of a number of the committee's critics. Justice Goldberg, for example, states that "additional personnel to assist the Court in the handling of its caseload would obviate the need for drastic change in our fundamental system of Supreme Court review . . . ."<sup>97</sup> Eugene Gressman offers the same suggestion along with the idea that a page limitation on petitions be established.<sup>98</sup> A research director of the Michigan court of appeals has suggested that a group of senior staff be formed in the Court to help digest applications. Such "commissioners," he states, have been used with regular success in many state courts of last resort. Unlike law clerks, members of such staffs would not leave yearly but would continue to accumulate experience.<sup>99</sup>

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95. REPORT, *supra* note 4, at 10-11.

96. *Id.* at 11-12.

97. Goldberg, *supra* note 23, at 16. For another favorable reaction to the use of senior staff, see FRIENDLY, *supra* note 55, at 50-51.

98. Gressman, *supra* note 6, at 255.

99. Stockmeyer, *Rx for the Certiorari Crisis: A More Professional Staff*, 59 A.B.A.J. 846, 849 (1973).

Whether or not the justices would want such a senior staff to make recommendations, such an office could supply certain economies and still not propose dispositions for petitions for certiorari. One such function would be to prepare summaries of the lower courts' holdings, to restate the questions raised and to indicate whether or not the applications were timely or subject to jurisdictional doubts. These digests could be prepared by the clerk's office in much the same way as the Reporter of the Court presently prepares official syllabi of its work. These summaries could be circulated to the chambers at the same time as the petitions. Each would be free to use the digests or to supplement them as necessary to tailor the memoranda to a particular justice's viewpoint and interests. Although this procedure would be of less aid to justices who read the petitions themselves, it would be welcome relief for the staffs of those justices who prefer to read summaries. The preparation of additional memoranda could be avoided where the clerk's digest was satisfactory. This would be but a slight extension of the law clerks "pool" now shared by five of the justices.

Yet it remains a "given" that a justice's time is finite and that he must personally make a decision on each petition. Once a justice has been on the bench long enough to identify a pattern of information he believes is relevant to these decisions and so long as he does not compromise that pattern, the time a justice must personally spend on the applications will rise as the filings mount from term to term. Although staff may distill and present the information a justice seeks, they cannot make the final decision.

Professor Black proposes that each justice use permanent staff to prepare summaries and recommendations. Although he seems to suggest that the justices would be more willing to rely exclusively on such documents than on the summaries and recommendations now prepared by law clerks, the fact is that many justices already rely heavily on law clerks' "cert memos." Thus, except to the extent that the justices would be more willing to rely exclusively on more exhaustive memoranda the idea would probably not save much time of the justices.<sup>100</sup>

If the day comes when such relief becomes imperative then serious consideration might be given to three simpler alternatives not examined by the Freund Committee in its report. The first is to post-

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100. Black, *supra* note 6, at 895-898. Professor Black believes the digests prepared under his proposal would be more attuned to a justice's interests than those now prepared because each digest would be read by at least two professionals with disagreements between them calling for review by still a third professional. *Id.* at 896.



pone any major surgery on the Supreme Court until after Congress addresses the serious "overwork" problem of the lower federal courts. It may well be that solving the latter problem will in turn cause the Supreme Court's docket to stabilize.<sup>101</sup> Judge Friendly has recently stated that the justices' time which could be saved by a rethinking and narrowing of federal jurisdiction would be "substantial."<sup>102</sup>

A second alternative is a delegation by the conference of the responsibility for prescreening applications to a rotating panel of justices. The panel would select those cases which any of its members believe would be of interest to *any* member of the Court and those cases would then be circulated to all of the chambers for analysis by each justice and for nominations to the discuss list, as now. Those cases rejected by the panel would not be reviewed by the other justices but automatically would be denied.

Although the Freund Committee is unimpressed with "panels" in its report, the reference appears to have been to the different idea of panels deciding cases on their merits, such as now is done by the Courts of Appeals. A panel to draw up a "circulation list" is an entirely different plan. It would provide part of the savings in time to be gained by a National Court of Appeals but would avoid at least some of its drawbacks. It would eliminate or at least substantially reduce the risk of denying a petition which should have been granted. The justices know one another's viewpoints and interests fairly well. Even now each justice is occasionally called upon to predict how his colleagues will vote on petitions for writ of certiorari when in chambers he is asked to grant a stay of a lower court's judgment pending disposition of the applicant's certiorari petition.<sup>103</sup> That the justices have performed this task with remarkably little controversy suggests that a

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101. See Carrington, *Crowded Dockets and the Court of Appeals: The Threat to the Function of Review and The National Law*, 82 HARV. L. REV. 542 (1969); Edwards, *Exorcising the Devil of Appellate Court Delay*, 58 A.B.A.J. 149 (1972); Hufstедler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901 (1971); Mishkin, *A Footnote to "A Crisis in Judicial Administration"*, 42 TEXAS L. REV. 1049 (1964); Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEXAS L. REV. 949 (1964). See also Lumbard, *Current Problems of the Federal Courts of Appeals*, 54 CORNELL L. REV. 29, 43-44 (1968).

102. FRIENDLY, *supra* note 55, at 50.

103. 28 U.S.C. § 2101(f) (1970) authorizes a single justice to stay the final judgment of a lower court in order to permit the filing of a petition for writ of certiorari. One requirement for granting such stays is a finding by the justice that there is a reasonable likelihood of four members of the Court eventually granting the writ. *Edwards v. New York*, 76 S. Ct. 1058, 1059 (1956) (Harlan, Circuit Justice); see STERN & GRESSMAN, *supra* note 5, at § 17.26(3).

panel of several justices could identify virtually all of the cases which would be of any interest whatsoever to their colleagues. Certainly predicting the concerns of a member of the Court is easier for three or so of his day-to-day intimates than for the judges of the Courts of Appeals. Moreover, such a panel would avoid altogether the problem of what to do with "holds" because the justices would easily recognize them and refer them to the circulation list. It would also avoid a new layer of judicial bureaucracy, an institutional check, and the chagrin of judges serving as glorified law clerks. And, it would not disturb the belief that the Supreme Court should be required to consider every man's grievance. It would, in a word, leave the present system almost intact while achieving a fair portion of the economies offered by the Freund Committee. Finally, this counterproposal leaves it up to the justices themselves to decide when, if ever, the pressures of the petitions have reached the breaking point.

Four possible objections come to mind. First, it would still be possible for an application to be denied even though under the present system it would be granted. As mentioned, however, the risk that the panel would fail to recognize a case which would be of interest to a colleague is remote in light of the intimate relationships enjoyed by the justices. Only in the period following a new appointment when these relationships have not yet formed would there be a substantial risk that the new appointee's concerns might be overlooked (or that he would overlook the interest of a colleague). Yet this risk would be ever present in the National Court of Appeals. Second, due to rotation off of the panel, the justices would not be exposed to as many of the worries and concerns of the American people as they presently are. This would be a loss but at least it would be less of a loss than that occasioned by the Freund Committee's plan. Moreover, the conference would be free to decide when full exposure was worth the candle. Third, panels would not conserve as much time as would a National Court of Appeals and therefore would be merely a "stopgap" measure. At least three justices would review all applications and all nine would review all applications placed on a circulation list—which might be as many as 1500 cases per term. All that would be spared would be six justices' time in reviewing the 2000 to 2500 cases which are relatively insubstantial. Under the assumptions used in calculating the time the National Court of Appeals would save, the use of panels would save approximately one-third of the savings of the new court.<sup>104</sup>

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104. Using the assumption in note 60 *supra*, and assuming panels of three were used, 2000 to 2500 cases each term would be reviewed only by a rotating group of

Until more time is needed, however, less drastic measures will be satisfactory. Indeed, the failure to exhaust available stopgaps may suggest major relief is not needed. Fourth, panels would abrogate the Rule of Four because fewer than six justices could deny a petition. To some extent this would be true, although there would be no change in the rule that four votes are necessary to grant a petition. The rule had its origin in a promise to Congress in 1925 that in exercising its certiorari jurisdiction the Court would not take too few cases.<sup>105</sup> Accordingly, four votes rather than a majority are enough to require the full Court to hear argument. The spirit of this rule would not be offended so long as the panels acted in good faith in attempting to identify frivolous cases which would be of no interest to any justice. Presumably there would still be at least 1100 cases (and probably more) referred to the full Court annually from which the discuss list could be compiled. Any four votes could then elevate any case on this menu to the argument calendar. The possibility that a rotating panel would intentionally and in bad faith deny a case of interest to a colleague is unthinkable. The promise made in 1925 would not be watered down.

A third alternative is to trim the number of cases taken for review. Each year 150-200 cases are decided on the merits. Although all of these decisions are important in the sense that the issues resolved have two or more reasonable points of view, many of them are not so important as to require an immediate and authoritative answer from the Supreme Court. By chopping a dozen or so cases each term, approximately a week could be saved for each justice. The extra time could be applied to the same collegial deliberations and other activities which would follow the establishment of the National Court of Appeals. Its only drawback would be a fewer number of final decisions each term. Of course, at some point further reductions would be undesirable, but today many would view a slight reduction in the decided cases as a viable option.

The conference already has the authority to deny close cases so long as it abides by its representation to Congress that it will continue

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three justices and would not be reviewed by a rotating group of six justices. All told, the savings would be 12,000 to 15,000 minutes, which, when divided evenly among the nine justices would be 22 to 27 hours per term per justice. This is slightly less than one-third of the eighty hours which the National Court of Appeals would save. It is important to recognize that panels would save slightly less than one-third of the time the new court would save, whether the latter figure is one week or one month. Justice Harlan opined in 1959 that a plan similar to panels would conserve an appreciable amount of the justices' time but thought the idea could not win approval. Harlan, *supra* note 8, at 114.

105. REPORT, *supra* note 4, at 39.

to decide approximately 150-200 cases annually. When the argument calendar begins to fill up too rapidly or slowly the conference has been known to adjust its generosity in granting review. If Congress were to make plain its approval of a small reduction—perhaps in an appropriate Committee Report—then the conference might adopt an informal plan designed to hold down the number of “grants” to allow freshman justices time to adjust. Such a statement might be part of the legislative history accompanying passage of a law eliminating appeals by right to the Supreme Court, legislation which would permit a reduction in the argument calendar.

### Conclusion

1. The threshold question is what approach should be employed to evaluate the proposal to create a National Court of Appeals. So far their attention has been riveted to the significance of ascending statistics, an inquiry which is satisfactory only if it is assumed that in an earlier day the resources of the Supreme Court were optimally allocated among its functions and it is concluded that the rising filings have had a negligible impact on that equilibrium. A more comprehensive and preferable approach is to contrast the advantages of the present and the proposed (and other) systems.

2. There is also a factual problem. An understanding of how the existing procedures work and a prediction of how they would be changed is required. Because the internal processes of the Supreme Court are shrouded in mystery, all the facts are hard to gather and reasonable minds may differ on some of the critical conclusions. One reasonable conclusion, however, is that the establishment of a National Court of Appeals would free about one week of each justice's time each year (and some time of the law clerks) and this time would probably be diverted to improving opinions or writing separate opinions that would otherwise have not been issued.

It is also reasonable to conclude that the National Court of Appeals would serve as a check on the pace of judicial activism. There will inevitably be times when the proclivities of the two courts will diverge. Moreover, even when the two courts are in step there will be an inevitable twenty or so cases each term which will be denied but would be granted by the Supreme Court if given the opportunity. At times the disadvantaged (or other groups at various times) will believe that their claims are being viewed with disfavor by the new court, the extent of the feeling depending upon the predilections of the two courts. The Supreme Court will also lose a convenient procedure

for keeping abreast of the business of the lower courts as well as for signaling the emerging interests of various justices. Finally, the hold system used by the National Court of Appeals would be workable but less desirable than the present hold system.

3. There remains the question of values. With one exception, all of the contrasts between the existing and the proposed system are pretty clearly either advantages or disadvantages, as the case may be. More time, for example, is undeniably a benefit. Professors Freund and Bickel have exalted this advantage by emphasizing that the Supreme Court should not be a mere switching station for efficient disposition of cases but rather a forum for the thoughtful and wise elucidation of national law and policy. Few would disagree. The problem is that even this model is threatened by the proposed court. There would be, for example, the abandonment of a facile means of advising the justices of the trends and business of the lower courts and of the justices communicating to the public the horizons of their interests. True, these advantages could be supplied in alternative ways. The justices could do more reading and give more speeches. But these are more time-consuming and less convenient than the orderly if swift review of applications for review. The result would be decisions which are less cognizant of related problems in analogous areas and a composition of argued cases different from those which would be heard were the Court better able to express its interests and be better informed. These also affect the quality of the adjudication process. Reasonable minds can surely agree that a collegial court is imperative yet differ over which set of consequences is the greater threat to it.

Were this all of the problem, all that would remain to the analysis would be the task of assigning values to the competing considerations. There is, however, the additional complication of the institutional check posed by the National Court of Appeals. Unlike the preceding factors, the issue of the institutional check does not involve how well the Supreme Court will perform its collegial role. Rather, it implicates the more enduring question of how pervasive a presence the Supreme Court should have. And, unlike each of the preceding considerations, there will be no consensus on the question of whether a less prominent Supreme Court is desirable or undesirable. On the one hand, many eminent scholars and statesmen have supported a strong Court because of a distrust of the states and the political process. Other constituents have been its fair-weather friends, those who hail the momentary trend of its decisions. A rein on the judiciary's ability to forge new policies and law cuts against these sentiments. On the

other hand, opposite yet reasonable views are plain. There are those who believe that in a democratic republic the role of nondemocratic institutions should be minimized. This basic policy choice must be faced once it is concluded that the image of the Supreme Court as a citadel of liberty is threatened or once it is concluded that the National Court of Appeals could serve as a check on the Supreme Court by adroit manipulation of procedure. To consider a National Court of Appeals Congress will have to lay bare these difficult and fundamental questions.

4. Finally, regardless of whether one prefers the present system or the National Court of Appeals, alternatives must be compared. Perhaps there is a change that would avoid many of the failings of both. Two not considered by the study group are suggested in this article. Furthermore, if it is likely that Congress will narrow the jurisdiction of the lower courts in the reasonably near future, then it might be best to compare alternatives for the Supreme Court after the effect of such reform can be measured.

